Supreme Court, U.S.
FILED
JUN 15 1993
OFFICE OF THE CLERK

No. 92-1987

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUSAN MORTON and WILLIAM MORTON,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in holding, under admiralty law, that a cruise line is absolutely liable for an assault committed by a crew member upon a passenger, without regard to whether the assault was within the course and scope of the crew member's employment?

2. Did the court below err in holding that a cruise line in a personal injury action is held to a strict liability standard for assaults committed by crew members against passengers, rather than a standard of reasonable care under the circumstances?

LIST OF PARTIES

Plaintiffs

Susan Morton

William Morton

Defendants

Carnival Cruise Lines, Inc.

Joaquin Martins De Oliveira

There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated January 19, 1993, is to be reported at 984 F.2d 289 and 1993 A.M.C. 843, and is reproduced at pages 1a through 8a of the Appendix to this Petition ("Pet. App."). The summary judgment order and the judgment of the United States District Court for the Central District of California are not reported and are reproduced at Pet. App. 9a-16a. A preliminary ruling and order of the district court is reproduced at Pet. App. 17a-18a.

JURISDICTION

The decision of the Court of Appeals was entered on January 19, 1993. Pet. App. 1a. A timely petition for rehearing was denied on March 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

No constitutional provisions, statutes, or rules are involved.

STATEMENT OF THE CASE

This case involves an action against a cruise line for personal injuries allegedly sustained by passengers during a vacation cruise. The claim is based on the admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333.

Respondent Susan Morton (hereinafter "Ms. Morton") alleges that she was drugged and sexually assaulted by an off-duty crew member aboard the cruise ship M/V TROPICALE while she and her husband, Respondent William Morton, were passengers. The M/V TROPICALE is owned and operated by Petitioner Carnival Cruise Lines, Inc. (hereinafter "Carnival"). While Carnival disputes the Respondents' factual allegations, these allegations are taken as true for purposes of the summary judgment motion at issue here.

Ms. Morton alleges that on the night of February 16, 1989, while her husband was gambling in the ship's casino, their dining room waiter, Joaquin Martins De Oliveira, came to the Mortons' cabin with a bottle of wine. Pet. App. 2a, 9a. Ms. Morton invited Oliveira into the cabin to share the wine. *Id.* Ms. Morton alleges that Oliveira drugged the wine, waited for her to become incapacitated, and then raped her. *Id.* She did not tell her husband about the attack for the rest of the cruise or for several weeks thereafter, nor did she report the attack to any ship personnel. *Id.*

The undisputed evidence indicated that if Oliveira was present at the Mortons' cabin, he was violating Carnival's regulations, which prohibited crew members from being in passenger cabins "unless in the line of their specific duty." Pet. App. 14a.[1] The undisputed evidence further indicated that Oliveira, as a dining room steward, "had no reason to be in, and was, in fact, prohibited from being in, plaintiffs' cabin." Pet. App. 14a-15a. The Mortons concede that there was no evidence Carnival provided inadequate security or failed to exercise reasonable care in the selection, retention, or supervision of Oliveira. Pet. App. 3a, 10a.

Based on the above agreed facts, Carnival moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The United States District Court for the Central District of California, the Honorable Matthew Byrne, Jr. presiding, found that Carnival owed its passengers the duty of exercising reasonable care under the circumstances. Pet. App. 10a. The court noted that the Mortons did not dispute that there was no evidence of a breach of Carnival's duty of care. Pet. App. 10a. Carnival's motion for summary judgment was therefore granted.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed. The appellate court based its analysis on its prior decision in *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926), which held that a common carrier of passengers is absolutely liable for the intentional torts of its employees, regardless of whether the torts are within the scope of their employment. Pet. App. 6a-7a. The Ninth Circuit held that the Mortons "would be entitled to recover from Carnival simply by showing that the assault was committed by the crew member during the voyage."

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[1] Ship's Rules and Regulations, *reproduced in* Defendant Carnival Cruise Lines, Inc.'s Response To Request For Production of Documents Propounded By Plaintiffs (Exhibit B), Aug. 4, 1990.

Pet. App. 4a. The Ninth Circuit therefore remanded with instructions that "the Mortons should be allowed to proceed to trial." Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTION VESTS THIS COURT WITH RESPONSIBILITY FOR MAINTAINING A UNIFORM BODY OF ADMIRALTY LAW

The importance of national and international uniformity in maritime law is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 221 (1986); *Sea-Land Servs., Inc. v. Gaudet,* 414 U.S. 573, 601 (1974); *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874). As this Court explained in *The Lottawanna,*

> the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) at 575.

And as Publius expressed in *The Federalist* No. 80,

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to public peace. The most important part of them are, by the present [Articles of] Confederation, submitted to federal jurisdiction.

The Federalist No. 80 (Alexander Hamilton).

The Framers therefore provided in Article III § 2 of the Constitution that the federal judicial power extends "to all Cases of admiralty and maritime Jurisdiction." This provision, athough on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828). Congress can, of course, modify the laws of admiralty by legislation, but the need for national and international uniformity in admiralty law is critical enough that even Congress is limited in its power to authorize the states to adopt rules of law that would lead to state-by-state variations in admiralty. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

For the reasons given below, this Court should exercise its important power over admiralty in this case to correct a persistent error by the Ninth Circuit in the application of this Court's doctrine of *respondeat superior* in admiralty cases and to provide needed clarification for lower courts that the standard of care owed by shipowners to passengers is reasonable care under the circumstances.

II. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE NINTH CIRCUIT HAS REPEATEDLY HELD, IN CONTRAVENTION OF THIS COURT'S PRECEDENT, THAT ADMIRALTY LAW MAKES A CARRIER ABSOLUTELY LIABLE FOR AN EMPLOYEE'S INTENTIONAL TORTS EVEN WHEN OUTSIDE THE SCOPE OF EMPLOYMENT

Under the standard employed by the Ninth Circuit, a cruise line is absolutely liable for an employee's intentional tort committed outside the course and scope of employment even though, as here, the shipowner exercised all

reasonable precautions in screening, hiring, retaining and supervising its crew and providing adequate shipboard security. However, in a decision that was entirely ignored by the court below, this Court has indicated that a shipowner cannot be held liable for an assault by a crew member unless the assault is committed in the course and scope of employment. *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887).

Brockett, like this case, involved a crew member's alleged assault upon a passenger. Plaintiff in *Brockett*, travelling as a deck passenger, sustained injuries when assaulted by crew members attempting to remove him from an area of the ship that was off-limits to deck passengers. This Court held:

> If the injuries necessarily arose from [plaintiff's] violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were . . . directly caused by the improper conduct of the carrier's servants, *either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them*, [plaintiff] is not precluded from claiming the benefit of the contract for safe transportation.

Id. at 645 (emphasis added).

Although the *Brockett* court found the shipowner liable, the Honorable Justice Harlan, writing for a unanimous court, repeatedly emphasized that liability was premised upon the crewmen acting in the course and scope of their employment when committing the assault:

> Their misconduct or negligence *whilst transacting the company's business, and when acting within the general scope of their employment*, is of necessity to be imputed to the corporation, which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraud-

> ulent, *'if,'* as was adjudged in *Philadelphia & Reading Railroad Co. v. Derby,* 14 How. 468, 486, *'it be done in the course of his employment,* the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, *if the act be done in the course of his servant's employment.'*

Id. (emphasis added).

The Court in *Brockett* repeatedly referred to the requirement that the assault must have been committed in the scope of the crew member's employment for liability to be imputed. The plainly indicated qualification of *Brockett* is that if a crewman is not acting within the course and scope of his employment in committing an assault, the shipowner is not liable.[2] This qualification followed from the fact that the shipowner's liability in *Brockett* was based on the doctrine of *respondeat superior,* which had always been understood to impose vicarious liability on employers only for acts of employees committed in the scope of their employment:

> "This rule," the court of appeals of New York well says, "is founded upon public policy and convenience. Every person is bound to use due care *in the conduct of his business. If the business is committed to an agent or servant,* the obligation is not changed."

121 U.S. at 645 (emphasis added) (citation omitted).

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[2] Indeed, the Court in *Brockett* reiterated the "scope of employment" qualification no fewer than seven times. *See* 121 U.S. at 645 ("within the scope of their general employment, or when in the discharge of special duties imposed upon them"); *id.* ("whilst transacting the company's business, and when acting within the general scope of their employment"); *id.* ("done in the course of his . . . employment"); *id.* ("in the conduct of his business"); *id.* at 646 ("engaged in executing the contract"); *id.* ("enforcement of reasonable regulations established by the carrier for the conduct of its business"); *id.* at 649 ("while assisting another servant in enforcing [the ship's] regulation as to deck passengers").

In *Brockett*, the assault was committed by on-duty crewmen in furtherance of the shipowner's business and within the duties of the crew: The crew were acting—albeit with excessive force—to cause the passenger to leave a part of the ship where he was not permitted to be. Here, in contrast, it is undisputed that Oliveira's alleged assault was plainly not committed in furtherance of Carnival's business, and, in fact, that Oliveira was violating the ship's regulations even by his mere presence in the passenger area.

Rather than consider whether the assault was within the scope of Oliveira's employment, the *Morton* court followed the Ninth Circuit's prior decision in *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926), which had also held a shipowner absolutely liable for the assault of a crew member upon a passenger, regardless of whether the assault was within the scope of employment. The Ninth Circuit's decision in *Morton*, as noted, never cites nor evaluates this Court's controlling decision in *Brockett*. The Ninth Circuit's 1925 decision in *Pacific* does cite *Brockett*, but it wholly disregards the extensive language in *Brockett* limiting vicarious liability only to torts committed within the scope of the crew member's employment.[3]

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[3] The Ninth Circuit in *Pacific* relied chiefly on a Washington Supreme Court case, *Marks v. Alaska S.S. Co.*, 71 Wash. 167, 127 P. 1101 (1912), for the proposition that "the rule is well nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment." The *Marks* decision, however, cited no authority for the supposedly "universal" rule. On the contrary, just prior to announcing the rule, the *Marks* court cited Thompson's *Law of Negligence*, which states a carrier's liability for an assault must be premised on a lack of due care. *See Marks*, 127 P. at 1102 (citing 3 Thompson, *Law of Negligence* §§ 3184, 3186-87). Confusingly, the *Marks* court also stated:

> It is undoubtedly the rule that a carrier is ordinarily *not* responsible for the tortious acts of his servants unless the servant

The Ninth Circuit sought to justify its continued adherence to *Pacific* on the basis that absolute liability for a crew member's intentional torts "cannot be traced to obsolete concepts regarding real property and feudalism," unlike the distinction between invitees and licensees that this Court rejected in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Pet. App. 6a. The Ninth Circuit then relied upon state tort law cases for the proposition that "common carriers owe such an absolute duty to their passengers." *Id.* In doing so, the Ninth Circuit disregarded not only this Court's decision in *Brockett*, but also the long-established rule that the standard of care in a maritime personal injury case is governed by maritime law, not state law. *See Kermarec*, 358 U.S. at 628.[4]

> is engaged in the contract of carriage, or, as said above, 'in the discharge of their assigned and appropriate duties' . . . .

127 P. at 1101 (emphasis added).

[4] The uncertainty of some lower courts as to the *respondeat superior* issue in admiralty cases is illustrated by the Second Circuit's decision in *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914). The passenger in *Rivers* was sailing from New York to Europe when a crew member entered her cabin using a pass-key that had been lost by another crew member. The passenger was assaulted in her cabin by the crew member. In reviewing the district court's jury instructions, the Second Circuit was unclear whether a finding of liability by the shipowner required the assault to be within the course and scope of the crew member's employment:

> Standing alone, [the charge] might possibly lead a jury to believe that the defendant was to be treated as an insurer of the safety of its passengers. But it did not stand alone. The judge charged expressly, more than once, that defendant was not an absolute insurer against assaults of this sort. *He pointed out the difference between an assault by an employee when carrying out the orders of his employer and a wanton one, committed when off duty.* . . . From a careful study of the whole charge . . ., we have reached the conclusion that Judge Holt was apprehensive that the distressing circumstances attending the assault might prejudice the jury. There-

III. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE NINTH CIRCUIT, IN IMPOSING ABSOLUTE LIABILITY, UNDERMINED THE IMPORTANT AND UNIFORM ADMIRALTY LAW STANDARD OF REASONABLE CARE UNDER THE CIRCUMSTANCES

In the absence of a basis for holding a shipowner vicariously liable for the intentional torts of an off-duty crew member committed outside the course and scope of employment, liability can be founded only upon tortious conduct by the shipowner itself. In the present case, it is conceded that Carnival was not negligent.

For over 100 years, this Court has consistently held a negligence standard controls the duty of a shipowner to passengers. A corollary to this rule is that a shipowner is not the absolute insurer of passengers' safety. The Ninth Circuit's imposition of absolute liability is wholly inconsistent with this Court's case law defining a shipowner's standard of care.

The principle that a carrier is not an absolute insurer of the safety of its passengers was first enunciated in *Stokes v. Saltonstall*, 28 U.S. (13 Pet.) 181, 191 (1839):

> It is certainly sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. *But although he does not warrant the safety of the passengers, at all events,* yet his undertaking and liability as to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; *and that as far as*

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fore he was most careful, even at the risk of giving some sound exceptions to plaintiff, to impress upon the jury that there could be *no recovery unless the proof showed some specific neglect* in exercising that degree of care which reasonable prudence would require of a carrier obligated to be watchful and vigilant to protect its sleeping passengers.

Id. at 298-99 (emphasis added).

> *human care and foresight can go, he will transport them safely.*

Id. at 191 (emphasis added).

Although *Stokes* involved a stagecoach accident, the rule that a carrier is not the absolute insurer of its passengers was soon held to apply to passenger ships. *The City of Panama*, 101 U.S. 453 (1880). In *The City of Panama*, a passenger travelling from Washington to San Francisco was injured when she fell through an open hatch in the floor of her cabin. Plaintiff sued alleging both negligence and breach of the contract of passage. The Court held passengers must present some proof of negligence to recover under either a tort or contract claim.

> [T]he owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, . . . Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert.

Id. at 462 (citations omitted).

The negligence standard has been required by this Court, without exception, as a prerequisite to a shipowner's liability to passengers. *Leathers v. Blessing*, 105 U.S. (15 Otto) 626 (1882); *The Admiral Peoples*, 295 U.S. 649 (1935).

In 1959, the Court re-examined the standard of care owed by shipowners to non-crewmembers generally in the landmark case *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). *Kermarec* involved an injury to a crewmember's friend who was visiting the vessel. The Court affirmed its prior application of the negligence standard to shipowners, adopting a general rule requiring a showing of negligence as a condition to liability: "We hold that the owner of a ship in navigable

waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632.

The reasoning of the Ninth Circuit below is inconsistent with the approach followed in *Kermarec*. Without any analysis or discussion, the *Morton* court concluded that "there is no doubt that the M/V CARNIVALE is a common carrier." Pet. App. 7a. The court then compared the legal duties of a cruise ship to those of other "common carriers" including trains and taxi cabs. *Id.* Seizing upon the "common carrier" standard, which had historically required exercise of a heightened standard of care, *Morton* held that the Supreme Court had "implicitly exempted" certain unspecified "meaningful categories" of cases from the reasonable care standard established in *Kermarec*. *Morton* erroneously determined that assault victims were such a subcategory of persons which this Court had "implicitly" exempted from the negligence standard enunciated in *Kermarec*.

Most courts have interpreted *Kermarec* to support a uniform rule that shipowners owe passengers a duty to exercise reasonable care under the circumstances of each case. For example, the First Circuit in *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347, 354 (1st Cir. 1988), held that "the appropriate legal standard" in a claim for intentional infliction of emotion distress committed by a ship's photographer was "the duty of exercising reasonable care under the circumstances." *See also Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989).

Indeed, the standard of reasonable care under the circumstances is simply a corollary of the rule expressed in cases such as *Stokes* and *The City of Panama* that a carrier is not an absolute insurer. The flexible and widely-recognized standard laid down in *Kermarec* permits courts

to impose a higher level of care where circumstances warrant, such as in protecting passengers from uniquely maritime dangers that passengers do not normally experience ashore. *Keefe,* 867 F.2d at 1322. However, when circumstances aboard ships differ little from those encountered ashore, the applicable standard of care should remain the same as on land. *Id.*; *Rainey,* 709 F.2d at 172.

One of the first published post-*Kermarec* decisions involving a cruise line was *Rainey.* The passenger in *Rainey* tripped over a bar stool while dancing in the ship's discotheque. In analyzing the applicable standard of care, the Second Circuit wrote:

> We have stated on a number of occasions that an ocean carrier must exercise a very high degree of care for the safety of its passengers. Respected commentators long ago have contended, however, that "[t]echnically the 'high degree' instruction is incorrect as a matter of principle . . . ." "What is required", they say, "is merely the conduct of the reasonable man of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care." In some instances, reasonable care under the circumstances may be a very high degree of care; in other instances, it may be something less.

Rainey, 709 F.2d at 170-71 (citations omitted). *Rainey* recognized that *Kermarec* mandated a uniform standard of reasonable care in all passenger cases:

> Following the lead of the Fifth Circuit, we hold that the Kermarec rule of reasonable care under the circumstances is applicable in passenger cases. The extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger, will determine how high a degree of care is reasonable *in each case.*

Rainey, 709 F.2d at 172 (emphasis added).

The issue of the standard of care applicable to cruise lines was again raised in the Second Circuit in *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988), which specifically rejected the notion that cruise lines should be absolute insurers of passengers' safety:

> Although some older cases called for a higher degree of care aboard ship, it is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances . . . . Consistent with these principles, a shipowner is not an insurer of its passengers' safety. *There thus must be some failure to exercise due care before liability may be imposed.*

Id. at 64-65 (citations omitted) (emphasis added). The *Monteleone* court also held the imposition of strict liability in passenger cases was incorrect, as a matter of law: "[T]he district court erred as a matter of law in holding that merely *allowing* the screw to protrude constituted a breach of BCL's duty to Mrs. Monteleone. In so holding, the court incorrectly made BCL an insurer of Mrs. Monteleone's safety." *Id.* at 65.

The same conclusion was reached by the Sixth Circuit in *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990), which extensively reviewed the prior decisions of the Supreme Court and the various circuits, and observed that proof of negligence had been required in passenger maritime cases for over 100 years. The Court acknowledged that the " 'extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case.' " *Id.* at 74 (quoting *Rainey*, 709 F.2d at 171).

Since the chances of a sexual assault occurring on a ship are no greater than those in a hotel ashore, these same legal principles should apply at sea as on land. In *Jaffess v. Home Lines, Inc.*, 1990 A.M.C. 1430 (S.D.N.Y. Apr. 22, 1988), which is directly on point with the present case, the court specifically noted:

> [W]e disagree with Jaffess' assertion that sexual assaults are more likely to occur on ships because ships are "closed" and "isolated" in nature. On the contrary, since ships do have so many employees and so many passengers, there are fewer situations in which a person will find oneself isolated than on land. Further, a person committing a sexual assault on land usually has an opportunity to flee the vicinity, while a person on ships cannot. If anything, sexual assault seems less likely to occur on ships than on land. We therefore find that what qualifies for "reasonable care under the circumstances" in this case is not enhanced because this incident took place on a ship rather than on land.

Id. at 1435.

Under the strict liability standard imposed by the Ninth Circuit, Carnival was clearly made the absolute insurer of the safety of its passengers. The logical conclusion is that any cruise line would be liable, even when it exercises all reasonable precautions in screening, hiring, retaining and supervising its crew and providing adequate shipboard security, all of which was conceded by Respondents below. If this Court does not make clear that the approach followed in the *Morton* decision is improper, courts will feel free to depart from this Court's reasonable care standard whenever they find a "meaningful category" or subcategory which, in their subjective view, should be exempted.

The standard of care applicable in any lawsuit is a threshold issue of singular importance in shaping the litigation. This Court should therefore grant certiorari to resolve the issue of the standard of care applicable to passenger suits and, in doing so, maintain the essential uniformity of maritime law.

IV. REVIEW OF THIS CASE IS APPROPRIATE BECAUSE THE SCOPE OF VICARIOUS LIABILITY HAS IMPORTANT PUBLIC POLICY IMPLICATIONS

During the century that has elapsed since this Court decided *Brockett*, many eminent legal scholars have explored the history and justification for the doctrine of vicarious liability. Holmes traced it to the "primitive law of deodands and noxal surrender" as reflected in Roman law, while Wigmore "thought the roots grew in German rather than Roman soil." [5] Although other questions were raised about the ancient roots of the doctrine, it was generally accepted that its modern version stems from the dicta of Lord Holt in the late seventeenth century.[6]

In the first half of the twentieth century, legal scholars conducted a lively debate over the validity and appropriate contours of the doctrine of vicarious liability. Prosser observed that a "multitude of very ingenious reasons have been offered" in support of the doctrine, although "courts have made little or no effect to explain the result, and have taken refuge in rather empty phrases . . . or the endlessly repeated formula of 'respondeat superior,' which in itself means nothing more than 'look to the man higher up.' "[7] One early scholar made the observation

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[5] 5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* (2d ed. 1986) (citing Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1892), and Wigmore, *Responsibility for Tortious Acts*, 7 Harv. L. Rev. 315 (1894)).

[6] *Id.* at 10 (citing *Boson v. Sandford*, 2 Salk. 440, 91 Eng. Rep. 382 (K.B. 1689) and other cases).

[7] William L. Prosser, *The Law of Torts* 459 (4th ed. 1971). Among the authorities cited by Prosser are Warren Seavey, Harold Laski, William O. Douglas, and Fleming James. For an exploration of the central role of Fleming James in the expansion of tort liability, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Leg. Studies 461 (1985).

that, "[i]n hard fact, the reason for the employers' liability is the damages are taken from a deep pocket." [8]

By the middle of the century, most scholars came to the view that the doctrine of vicarious liability can be justified only as a rule of policy, based on the notion that an employer is best able to spread the cost of injuries to society at large.[9] One leading treatise states that "by fictions and procedural devices [modern tort law] has subordinated fault to the need for compensation supported by enterprise liability. Vicarious liability is one of the cornerstones of this newer structure." [10]

Over the past decade, however, an even newer wave of legal scholarship has called into question the once-dominant view that expansive doctrines of tort liability represent sound policy.[11] Among other things, the efficiency of the tort system has been called into question by studies showing that legal fees and other transaction costs generally exceed the amount of money that actually goes to compensate victims.[12]

In this context, it is certainly appropriate for this Court to reexamine the contours of the doctrine of vicarious liability in maritime law. If the "scope of employment" test applied in *Brockett* is to be supplanted by a test of absolute liability such as that adopted by the Ninth Circuit, then this Court itself should consider the wisdom of such a far-reaching change in the law.[13] Scrutiny of such

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[8] Baty, *Vicarious Liability* 154 (1916).

[9] Prosser, *supra*, at 459 and authorities cited therein.

[10] Harper, James & Gray, *supra*, at 20-21.

[11] *See generally* American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* (1991) and authorities cited therein.

[12] See James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (1986) (RAND study).

[13] Moreover, as an intermediate state court has astutely pointed out, there is no basis for departing from these basic rules simply

a change is particularly appropriate because it would create a departure not only from the rule expressed in *Brockett*, but also from longstanding principles of shoreside law. *See* American Law Institute, *Restatement (Second) of Agency* §§ 216, 228, 234-35, 245 (1958).[14]

This is an issue of practical, as well as theoretical, importance. Personal injury cases involving maritime law constitute a significant portion of the federal civil docket, with 2,752 cases being filed in the last year.[15] The cruise industry in the United States has grown enormously over the past two decades, now embarks over 4 million passengers a year, and is predicted to embark some 8 million by the year 2000.[16] This Court should clarify the ap-

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because a claim is brought under a theory of breach of contract or warranty instead of in tort. *See G.L. v. Kaiser Found. Hosps., Inc.*, 746 P.2d 731 (Or. Ct. App. 1987), *aff'd*, 757 P.2d 1347 (Or. 1988) (*en banc*). In *Kaiser*, a hospital patient was sexually assaulted by a hospital employee, and the patient sued for breach of an implied warranty of safety. The court held that an employer is responsible only when it is negligent or when the employee acted in the course and scope of his or her employment. *Id.* at 734. The court observed that plaintiff's implied warranty theory would "eliminate the negligence standard" and "replace it with an absolute liability standard through the artifice of placing a contract label on what is inherently a matter of tort law." *Id.* at 734.

[14] For example, hotels and similar establishments are generally not strictly liable for an employee's assault upon a guest, provided that the establishment exercised reasonable care for the safety and protection of its guests; rather, an employee committing a criminal act outside the scope of his employment is considered a third person for whom there is no vicarious liability, absent independent negligence on the part of the employer. *See* American Law Institute, *Restatement (Second) of Torts* § 344 cmt. b (1965).

[15] Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 28 (1992) (for year ending September 30, 1992).

[16] *See* Allen Borcover, *Positive Attitude: Some Aspects of Travel Industry See Better* '93, Chi. Trib., Nov. 8, 1992, at 2.

plicable law and provide guidance to the lower courts on the proper standards of liability in such cases.

CONCLUSION

This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55125

D.C. No. CV-90-0315-WMB

SUSAN MORTON; WILLIAM MORTON,
Plaintiffs-Appellants,

v.

JOAQUIN MARTINS DE OLIVEIRA, and
CARNIVAL CRUISE LINES, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding

Argued and Submitted
February 6, 1992—Pasadena, California

Filed January 19, 1993

Before: Melvin Brunetti, Diarmuid F. O'Scannlain, and
Thomas G. Nelson, Circuit Judges

Opinion by Judge Brunetti

John N. Connell, Anderson & Connell, Bellingham, Washington, for the plaintiffs-appellants.

William L. Robinson, Lillick & Charles, Long Beach, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

This admiralty case arises from an alleged rape on board a cruise liner. We must decide whether the Supreme Court has implicitly overruled this circuit's law that a ship owner is absolutely liable for a crew member's assault on a passenger.

I

Plaintiffs Susan and William Morton paid to take a cruise in 1989 on the M/V Carnivale, a ship owned and operated by Carnival Cruise Lines, Inc. Crew member Joaquin De Oliveira served as their regular dining room waiter.

One evening, while William Morton was at the ship's casino, Susan Morton was alone in their cabin when, according to her account, De Oliveira appeared at her door with a bottle of wine and two glasses and said he thought the Mortons would like to sample some.

Susan asked him in and they exchanged pleasantries and each had a glass of wine. According to Susan, she began to feel dizzy. She asked De Oliveira to get her husband, but instead De Oliveira pushed her on the bed and raped her. She did not tell her husband immediately about the attack nor did she report it to authorities aboard the ship.

De Oliveira, who no longer works for Carnival and apparently cannot be located, made a statement to a Carnival security official in which he denied raping Susan Morton. He claimed in essence that he was delivering a container of milk when she invited him inside for some wine and then attempted to seduce him. He denied having intercourse with her. Several weeks after the cruise

ended, according to her deposition, Susan Morton told her husband she had been assaulted by De Oliveira during the cruise.

The Mortons sued De Oliveira and Carnival Cruise Lines. After a period of discovery, the Mortons conceded that they would be unable to show any negligence by Carnival in hiring or supervising De Oliveira. Instead, their complaint rested on a theory of a ship owner's absolute liability for assaults on passengers by its crew members.

The district judge determined that "those cases relied upon by the plaintiffs in support of a strict liability standard have been superseded or over-ruled" by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), *overruled on other grounds,* 398 U.S. 375 (1970). The district judge concluded: "Therefore, a negligence standard of reasonable care under the circumstances is to be applied in determining the liability, if any, of Carnival Cruise Lines, Inc., in this case." Because the Mortons could present no evidence of any negligence by Carnival, the district judge granted summary judgment for Carnival. The Mortons now appeal.

II

We review summary judgments and questions of law de novo. *See Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied,* 496 U.S. 937 (1990). The parties agree that general maritime law applies. The Mortons claim that the district court erred in concluding that Carnival was not absolutely liable for an assault by a crew member. The Mortons contend that they should be allowed to proceed to trial.

We begin by examining the Ninth Circuit case on point. In *Pacific S.S. Co. v. Sutton,* 7 F.2d 579 (9th Cir. 1925), *cert. denied,* 269 U.S. 586 (1926), a teenage girl sued

a ship owner alleging that two crew members assaulted her during a voyage. She received a judgment against the ship owner and the ship owner appealed.

The court first noted the carrier-passenger relationship and its consequences:

> [B]y the sale of the ticket there arose a contractual relationship between the company and the passenger, to which relationship the law by its own force annexed certain implied obligations and duties to be observed and performed by the parties, respectively, toward each other. The contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants.

7 F.2d at 580. The court then reviewed several authorities outlining the duties of a carrier before quoting the Washington Supreme Court:

> Appellant by the act of employment vouched for his deportment during the voyage. A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage. * * * As long as respondent was a passenger on appellant's ship, appellant owed him a *duty of absolute protection* from the assaults and aggressions of its servants, and the rule is well nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment.

Id. (*quoting Marks v. Alaska S.S. Co.*, 127 P. 1101 (Wash. 1912)) (emphasis added; omission in original). This court then concluded: "It therefore follows that the court was right in treating the case as in contract, controlled by the general principles stated." *Id.* In the present case, there is no dispute that a carrier-passenger relationship existed between Carnival and Susan Morton. Under *Pacific,* then, Morton would be entitled to recover from Carnival simply by showing that the assault was committed by the crew member during the voyage.

Carnival, however, contends that the Supreme Court implicitly overruled *Pacific* in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In *Kermarec*, a visitor aboard a ship suffered injury as a result of the ship owner's negligence. The district judge instructed the jury that because the visitor was a licensee, the ship owner could be liable only if it actually knew of the hazardous condition and failed to warn the visitor of the hazard.

The Supreme Court stated the issue as "whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law." *Id.* at 630. The Court found no such distinctions in maritime law: "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632.

In isolation, this statement might support Carnival's contention and the district court's conclusion. But read in the context of the entire opinion, it does not necessarily reject the principle that a ship owner is absolutely liable for its crew members' assaults upon passengers.

In deciding *Kermarec*, the Court first noted that it "must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts." *Id.* at 630. The Court then focused on why the common law concept of the invitee/licensee distinction is inappropriate in admiralty law: "The distinctions which the common law draws between license and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." *Id.*

The Court found that such distinctions "originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect

entirely alien to the law of the sea." *Id.* at 631-32. The Court then concluded that eliminating these distinctions and applying a general standard of reasonable care made more sense for admiralty law.

Even with that conclusion, however, the court noted:

> This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea.

Id. at 632 n.9.

In that note, the Court makes clear that "reasonable care under the circumstances" is not the universal standard of care to be provided aboard ship. A different standard may apply where it makes sense under maritime law.

Unlike the invitee/licensee distinction, the rule regarding absolute liability for crew members' assaults cannot be traced to obsolete concepts regarding real property and concepts of feudalism. Rather, it is a widely adopted rule that common carriers owe such an absolute duty to their passengers. *See, e.g., St. Michelle v. Catania,* 250 A.2d 874, 876-78 (Md. 1969) (carrier vicariously liable for assaults committed by employees even outside their employment during the contract for transportation); *Whittle v. Southern Bell Tel. & Tel. Co.,* 410 S.E.2d 575, 575 (S.C. Ct. App. 1991) (same); *Nazareth v. Herndon Ambulance Serv., Inc.,* 467 So.2d 1076, 1078-81 (Fla. Dist. Ct. App.) (same), *review denied,* 478 So.2d 53 (Fla. 1985). A leading torts treatise explains the general rule:

> Where the deliberate or willful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been many qualifications. The relationship between master and plaintiff may be such as to put on

> the master a duty of protective care that he may not delegate. Thus a carrier is liable to its passengers for assaults by employees prompted by purely personal motives.

5 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 26.9, at 53 (2d ed. 1986).

There is no doubt that the M/V Carnivale is a common carrier and that many of the concerns that led to the establishment of this rule are present on ships as well as trains, taxi cabs and other carriers.

Given this meaningful basis for the rule, we find that the Court's decision in *Kermarec* cannot be read to overrule it. The Court explicitly exempted unseaworthiness claims from its holding; we think it is clear that it implicitly exempted other "meaningful categories."

We are not persuaded by Carnival's argument that this circuit has adopted the *Kermarec* standard as all-encompassing through cases such as *Craig v. M/V Peacock*, 760 F.2d 953 (9th Cir. 1985). In *Craig*, the issue was whether or not the plaintiff was a seaman and thus entitled to the special protection. This court found he was not a seaman, and thus "the only duty owed him by Shipowners was that of exercising due care under the circumstances." *Id.* at 955. The court in that case was not confronted with an assault by a crew member; rather it simply had to decide whether the plaintiff was a seaman. If he was not, there was no dispute as to the standard of care owed him because his misfortune was the result of at most negligence and not any intentional acts by crew members.

We also are not persuaded by the contrary result reached in *Jaffess v. Saavedra*, No. 85 Civ. 7365 (MJL), 1988 U.S. Dist. LEXIS 3481 (S.D.N.Y. April 18, 1988). In that case, the district court found that a ship owner was not liable for an assault by a ship employee because the plaintiff did not show any negligence by the ship

owner. The court appeared to be bound by *Compagnie Generale Transatlantique v. Rivers,* 211 F. 294 (2d. Cir.), *cert. denied,* 232 U.S. 727 (1914), a case that, according to the district court, suggested that a plaintiff must show some fault by a ship owner before recovering for an assault by a crew member. As discussed above, we are bound by contrary Ninth Circuit precedent.

In conclusion, we hold that *Pacific* remains the law of this circuit. It is clear that we do not have the authority to set it aside; only the court sitting en banc may overrule a prior decision of the court. *See Montana v. Johnson,* 738 F.2d 1074, 1077 (9th Cir. 1984). Accordingly, the Mortons should be allowed to proceed to trial.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 90-315-WMB

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,
v.
JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 5, 1990]

I. BACKGROUND

This case arises out of an alleged rape on the high seas. Plaintiffs Susan and William Morton paid to take a luxury cruise upon a ship owned and operated by defendant Carnival Cruise Lines ("Carnival"). Plaintiffs allege that on the night of February 16, 1989, while Susan's husband, Bill, was in the ship's casino, crew member De Oliveira, who was the steward at the Morton's dining table, came to the Morton's cabin with a bottle of wine. Susan invited De Oliveira into the room so that he and Susan could drink the wine. Plaintiffs further assert that De Oliveira drugged the wine and, after Susan felt the effects of this drug, raped her. Susan failed to report this alleged rape to her husband when he returned to the cabin or to any of the authorities aboard the vessel during

the balance of the cruise. The sole factual issue in the case is whether the sexual contact between Susan Morton and De Oliveira was consensual. The parties agree that the matter is controlled by general maritime law.

On September 10, 1990, the Court issued an order with respect to the extent to which a shipowner can be held responsible for the tortious actions of its crew members. The Court held that the owner of a cruise line owes a duty of reasonable care under the circumstances to its passengers. *See e.g., Kermarec v. Compagnie Generale Transatlantique,* 79 S.Ct. 406 (1959), *overruled on other grounds, Moragne v. States Marine Lines, Inc.,* 90 S.Ct. 1772 (1970).

Currently before the Court is defendant Carnival's motion for summary judgment. Carnival asserts that it is entitled to summary judgment because there is no evidence that it breached its duty to exercise reasonable care under the circumstances. Carnival bases this motion on the ground that there are no material facts in controversy and that it is entitled to judgment in its favor as a matter of law. Plaintiffs do not dispute Carnival's assertion that plaintiffs have not, and cannot, present any evidence showing that Carnival breached its duty of reasonable care.

On November 6, 1990, the Court held a hearing on defendant Carnival's motion for summary judgment. During the hearing, plaintiffs' counsel asserted that defense counsel had obstructed plaintiffs' efforts to obtain sufficient discovery to oppose this motion. The Court ordered that a hearing would be held on the question of whether there was a basis for denial of Carnival's motion because plaintiffs had been precluded from an adequate opportunity for discovery. On November 15, 1990, plaintiffs filed with the Court a statement that they were withdrawing their request for additional discovery and that the Court should proceed with the determination of Carnival's motion for summary judgment.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are deemed "material" if a dispute over them "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510, (1986).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Id.* at 2514. Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

A. *Evidence of Adequate Security*

Carnival correctly asserts that the instant case does not involve a question of forcible entry. Carnival submits an excerpt of the deposition of Susan Morton in which plaintiff clearly admits that she invited De Oliveira inside her cabin to drink wine. Plaintiffs neither respond to this argument nor dispute this evidence. Accordingly, whether Carnival maintained safe and secure premises is not at issue here.

B. *Evidence of Breach of Duty to Exercise Reasonable Care in the Selection, the Retention, or the Supervision of Employees*

Carnival argues that plaintiffs can show no triable issues of fact regarding whether Carnival knew or should have known that De Oliveira was inclined to commit a sexual assault. Carnival asserts, therefore, that there are no disputed issues of material fact with respect to whether it breached its duty to exercise reasonable care in the selection, the retention, or the supervision of De Oliveira.

1. *Selection of De Oliveira*

California law with respect to negligent hiring and retention of employees is set forth in the Restatement (Second) of Agency, Section 213, which provides in pertinent part,

> "A person conducting an activity through servants . . . is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons . . . involving risk of harm to others: . . ."
>
> Comment d reads in part: "The principal may be negligent because he has reason to know that the servant . . . , because of his qualities, is likely to harm others in view of the work . . . entrusted to him. . . .
>
> * * * *
>
> Liability results under the rule . . . , not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. . . ."

cited in *Underwriters Ins. Co. v. Purdie,* 193 Cal. Rptr. 248, 255 (Cal. App. 2 Dist. 1983).

Absent evidence of known character or past conduct indicating dangerous propensities, an employer cannot be held liable for negligent hiring. In *Boykin v. District of*

Columbia, 484 A.2d 560 (D.C. Ct. App. 1984), a teacher sexually assaulted a twelve-year-old girl who was blind, deaf, and dumb. Although the teacher had a clean record, plaintiff argued that the school should have foreseen that such conduct would occur because the teacher's position afforded him the opportunity for unsupervised, one-on-one contact with the child. The appellate court rejected this argument as a matter of law, stating,

> In a case such as this where the injury was caused by the intervening criminal act of a third party, the [employer] is liable for negligence only if the danger of the act "should have been reasonably anticipated and protected against." . . . Normally an actor in the [employer's] position has less reason to anticipate criminal misconduct than to anticipate negligence "since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."

Id. at 565, (citations omitted).

Carnival asserts that in the instant case there is no evidence that it failed to exercise reasonable care in hiring De Oliveira. De Oliveira did not have a prior criminal record nor was there any evidence of dangerous propensities. Once again, plaintiffs fail to offer evidence to dispute this argument.[1] Accordingly, the Court finds

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[1] As exhibit F to their opposition papers, plaintiffs submit an excerpt from the deposition transcript of Joseph Fields. Fields stated that he had no direct knowledge of whether Carnival did a background check on De Oliveria or of what types of checks Carnival generally performed on prospective employees. However, Fields further asserted,

> We hire people from 42 nations. Some people from impoverished countries where there are no police departments. There are no telephones. There are no numbers on their houses. It would be virtually impossible to do a background check on every individual that comes to Carnival Cruise Lines.

Plaintiffs' evidence does not imply that Carnival was negligent in hiring De Oliveira. The testimony of Joseph Fields states only

that there are no triable issues of fact with respect to whether Carnival breached its duty to exercise reasonable care in the selection of De Oliveira.

2. *Retention of De Oliveira*

Carnival submits that the contents of De Oliveira's personnel files provided no indication to defendant that De Oliveira might be dangerous. The file reveals that during his four year tenure with Carnival, De Oliveira received a total of four employee warnings. These citations, however, refer to work-related incidents, such as leaving dirty dishes out and refusing to pick up a glass he had dropped. Moreover, the file is devoid of evidence of prior unauthorized contact with passengers or entry into passenger areas. There is nothing contained in De Oliveira's employee record that should have put Carnival on notice that he was likely to commit rape.

Once again, plaintiffs neither address this argument nor submit any evidence to dispute the facts alleged by Carnival. The Court, therefore, finds that there are no triable issues of material fact regarding whether Carnival was negligent in retaining De Oliveira.

3. *Supervision of Employees*

Carnival offers excerpts from the depositions of Joseph Fields and Armand Colson to demonstrate that ship rules and regulations prohibit crew members from entering passenger areas, unless they must do so in the line of their specific duty. As a dining-room steward, De Oliveira had no reason to be in, and was, in fact, prohibited from

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that he had no knowledge about how Carnival investigated employees such as De Oliveira. Fields merely offered his opinion that it would be virtually impossible to conduct a detailed investigation. Moreover, plaintiffs do not submit evidence that De Oliveira had a prior criminal record or a vicious disposition of which Carnival should have been aware. Furthermore, as explained below, De Oliveira worked for Carnival for four years, during which time his employment history was very good.

being in, plaintiffs' cabin. Colson further stated that crew members remain under the command of the ship's officers even when off duty and are constantly monitored,

> The procedure that was in force at the time of this incident involved the normal rounds by the security officer, and to report or detain, as the case may be, crew members who are found in unauthorized areas. It doesn't matter what the unauthorized area is.
>
> * * * *
>
> They can be detained, basically put in jail on the ship.

Plaintiffs failed to address this argument and to offer any facts to dispute it. The Court, therefore, finds that there are no triable issues of material fact with respect to whether Carnival breached its duty of reasonable care under the circumstances in the supervision of De Oliveira.

III. CONCLUSION

The Court grants Carnival's motion for summary judgment on the grounds that there are no material issues of fact regarding whether Carnival breached its duty of reasonable care under the circumstances. There is no evidence that Carnival provided inadequate security or that Carnival failed to exercise reasonable care in the selection, retention, and supervision of De Oliveira.

DATED: Dec. 4, 1990

/s/ Wm. Matthew Byrne
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

[PROPOSED] JUDGMENT

[Filed Dec. 17, 1990]

Pursuant to the Court's ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, filed December 5, 1990,

IT IS HEREBY ORDERED that judgment be entered in favor of Defendant Carnival Cruise Lines, Inc. and against Plaintiffs Susan Morton and William Morton, and plaintiffs are to take nothing on their Amended Complaint.

DATED: December 13, 1990

/s/ William M. Byrne, Jr.
WILLIAM M. BYRNE, JR.
Judge, United States District Court

SUBMITTED BY: LILLICK & CHARLES

/s/ Kathy W. Stein
KATHY W. STEIN

DATED: December 10, 1990

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON,
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

NOTICE OF RULING AND ORDER

[Oct. 1, 1990]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

A hearing was scheduled and held on September 10, 1990 to determine the standard of care owed by Defendant Carnival Cruise Lines, Inc., to plaintiffs in this case, and Plaintiffs' Motion for Partial Summary Judgment. Plaintiffs were represented by David Anderson of Anderson & Connell, who appeared by telephone. Defendant Carnival Cruise Lines, Inc., was represented by William Robinson and Kathy Stein of Lillick & Charles, who also appeared by telephone.

At the September 10, 1990 hearing, the court announced its disposition of both the determination of the standard of care, and the Motion for Partial Summary Judgment, and its reasons therefore, into the record. The court further ordered counsel for Carnival Cruise Lines, Inc., to prepare this formal order consistent therewith.

The court finds as follows:

Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959) establishes the standard of care owed by a vessel owner to all non-crewmembers. In *Kermarec*, the U.S. Supreme Court defined this standard as "reasonable care under the circumstances." 358 U.S. at 362. The *Kermarec* standard has been applied by other circuits in passengers cases, *Gibboney v. Wright*, 517 F. 2d 1054, 1059 (5th Cir. 1975); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1975); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Monteleone v. Bahama Cruise Line, Inc.*, 538 F.2d 63, 65 (2d Cir. 1988); *Muratore v. M/S. Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d. 416, 421 (5th Cir. 1986), and by the Ninth Circuit, *Craig v. M/V Peacock*, 760 F.2d 953 (9th Cir. 1985). This court finds that those cases relied upon by the plaintiffs in support of a strict liability standard have been superseded or over-ruled by *Kermarec*. Therefore, a negligence standard of reasonable care under the circumstances is to be applied in determining the liability, if any, of Carnival Cruise Lines, Inc., in this case.

Plaintiff's Motion for Partial Summary Judgment is denied.

Respectfully Submitted,

LILLICK & CHARLES

DATED: September 26, 1990

/s/ William L. Robinson
WILLIAM L. ROBINSON
KATHY W. STEIN
Attorneys for Defendant,
CARNIVAL CRUISE LINES, INC.

IT IS SO ORDERED.

/s/ William M. Byrne, Jr.
WILLIAM M. BYRNE, JR.
Judge, United States District Court

DATED: Oct. 1, 1990

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 90 0315 WMB(T) x

SUSAN MORTON and WILLIAM MORTON
Plaintiffs,

vs.

JOAQUIN MARTINS DE OLIVEIRA and
CARNIVAL CRUISE LINES, INC.,
Defendants.

DEFENDANT CARNIVAL CRUISE LINES, INC.'S, ANSWER TO AMENDED COMPLAINT

[Filed Apr. 13, 1990]

DEFENDANT CARNIVAL CRUISE LINES, INC., (hereinafter "CARNIVAL") for itself alone, hereby responds to Plaintiffs' Amended Complaint as follows:

* * * *

TENTH AFFIRMATIVE DEFENSE

27. The alleged assault did not occur in the course and scope of Defendant OLIVEIRA's employment with CARNIVAL and was done, if at all, without the knowledge and consent of CARNIVAL and solely out of the personal motivation of Defendant OLIVEIRA, and therefore plaintiffs cannot recover against this defendant.

* * * *